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31 CFR Part 515
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March 31, 2003

Chief of Records
ATTN. Request for Comments
Office of Foreign Assets Control
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Re: Reporting and Procedures Regulations; Cuban Assets Control
Regulations: Publication of Economic Sanctions Enforcement Guidelines

Dear Chief of Records:

The National Lawyers Guild (the Guild) submits the following comment to proposed regulations published in the Federal Register on or about January 29, 2003, which includes appendices to the Reporting and Procedures Regulations of the Economic Sanctions Enforcement Guidelines, 31 C.F.R. 501, as well as to the Cuban Assets Control Regulations, 31 C.F.R. 515.

The National Lawyers Guild strongly objects to the proposed regulations regarding Economic Sanctions Enforcement Guidelines, and also adamantly objects to the proposed appendix to the Cuban Assets Control Regulations. The Guild asserts such a strong position on such issues because the Guild, founded in 1937, has always believed that restrictions on people's travel are a constitutional violation.

OFAC's stated objective for such proposed appendices to the current regulations is, " . . . to provide OFAC with a procedural framework of general applicability to promote consistency while allowing for the appropriate exercise of agency discretion. They are also intended to promote the transparency of OFAC's procedures and better inform the regulated community." While such an objective sounds rational, we believe that the proposed rulemaking, rather than achieving the stated

objective, is, instead, draconian in nature because it sets up a stringent procedure for punishing people who have done nothing other than travel to another country.

First and foremost, the Guild reiterates its position that the Cuban Assets Control Regulations, which prohibit travel to Cuba without a license, prevents United States citizens from exercising two fundamental rights of the United States Constitution. The Fifth Amendment of the U.S. Constitution provides that no person may be deprived of liberty without due process of law. The Supreme Court has held that freedom of movement (or freedom to travel) is a fundamental right that cannot be restricted without due process of law. Additionally, the First Amendment freedoms of expression, speech, to gather information, and of association - also fundamental rights in a democratic society - are infringed upon when people are not permitted to travel. While the Guild does not anticipate that OFAC will rescind the Cuban Assets Control Regulations through this comment, we believe it is important for us to again state that we oppose the existence of such regulations as long as they infringe upon our constitutional rights. Thus, this letter will set forth the specific objections that we have to OFAC's proposed regulations. It will cite each objection in the order that OFAC presented the proposed rule in the Federal Register, rather than cite objections in order of importance.

31 C.F.R. Part 501(II) - License Suspension and Revocation; Cautionary and Warning Letters

The Guild strongly objects to OFAC suspending or revoking OFAC general or specific licenses because "[the] party has willfully made or caused to be made in any license application, or in any report required pursuant to a license, any statement that was, at the time and in light of the circumstances under which it was made, false or misleading with respect to any material fact or has omitted to state in any application or report any material fact that was required."

It is well established that individuals and institutions that apply for specific licenses to travel to Cuba are put through a rigorous, overly burdensome application process. OFAC's guidelines for specific license applications demand "[a] full-time itinerary broken down by half-day or smaller intervals, describing for each interval what the focus and nature of activities will be under the [] program," as well as a statement of the "ratio of Cuban nationals to U.S. participants in each event." The application also considers whether a great portion of the activities of the proposed trip will be with people "acting, directly or indirectly, for or on behalf of the Government of Cuba or its parastatal industries or enterprises."

Thus, to impose a penalty on individuals or institutions that make every effort to comply with OFAC's burdensome application is overly harsh. It is reasonable that at the time that a licensing application is submitted to OFAC, that the applicant cannot not possibly provide OFAC with all of the requested information, either because the application must be submitted so far in advance from the actual travel date or because Cuba's state-run educational system imposes some changes or limitations on the itinerary or who the travelers may meet. Thus, we object to OFAC stripping an individual or an institution of their license for a mere omission of information not known at the time

the application was submitted or for a mere change in information at the time of actual travel.

Further, we object to OFAC's proposed requirement that a license may be revoked or suspended if "[t]he party has failed to file timely reports or comply with the record keeping requirements of a general or specific license." OFAC does not follow a consistent practice of informing license applicants of report or record keeping requirements or deadlines. Thus, to impose a penalty for failure to comply with such requirements or deadlines, which are often unknown to the individual or institution, is unnecessarily severe nature.

In light of recent events, the Guild strongly objects to OFAC's proposed rule to suspend or revoke a license because "[t]he party has counseled, commanded, induced, procured, or knowingly aided or abetted the violation by any other person of any provision of any law or regulations referred to above." Such a vaguely worded rule clearly violates freedom of speech - an important freedom in a democratic society - set forth in the First Amendment of the U.S. Constitution. The rule permits arbitrary and capricious decisions on the part of OFAC about what speech is considered a violation of such rule. This is evidenced in a recent case that was brought to the Guild's attention in approximately the last six months of an individual who received a pre-penalty notice from OFAC for merely posting information on a website regarding an event in Cuba. To sanction individuals and institutions for exercising their freedom of speech by imposing the arbitrary rule prohibiting communication! s regarding travel to Cuba couldn't be more draconian.

The Guild additionally objects to OFAC's proposed rule suspending or revoking a license if "[t]he party has committed any other act or omission that demonstrates unfitness to conduct the transactions authorized by the general or specific license." Such rule is vague and permits OFAC to have too much leeway in sanctioning people for unspecified activities.

31 C.F.R. Part 501(III) - Civil Penalties

The Guild strenuously objects to OFAC's proposed rule that "[e]ach failure to respond to a requirement to furnish information, issued pursuant to 31 C.F.R. 501.602, generally will result in a proposed penalty in the amount of \$10,000, irrespective of whether any other violation is alleged." Such a rule goes against the privilege against self-incrimination, due process of law and administrative procedure. OFAC issues requirement to furnish information (RFI) letters in an effort to obtain evidence that may be used against an individual or institution. Anyone who receives such a letter has the right to decline to provide the requested information. To impose a fine for failure to respond to an RFI letter, a right that the recipient has, is arbitrary and capricious and in violation of the Administrative Procedure Act. Further, the Guild urges OFAC to inform individuals of their rights if an individual is contacted by OFAC, including their right to legal representation. OFAC! chronically fails to inform people that they have the right to contact a lawyer and when people's constitutional rights are being implicated, as here, they should be informed of the right to counsel.

The Guild objects to OFAC's proposed rule regarding mitigating and aggravating factors. Firstly, OFAC proposes, "departures from these guidelines or from prior history will be considered where appropriate." Such an arbitrary and capricious standard allows for discriminatory treatment of individuals who allegedly violate the Cuban Assets Control Regulations. To include such a statement in proposed regulations flies in the face of the alleged objective of the proposed rules, which is to promote consistency.

OFAC proposes "voluntarily disclosure" as a mitigating factor in the imposition of a fine, such that it may mitigate a fine by at least 50%. OFAC also states that voluntary disclosure is only met if disclosure occurs prior to OFAC receiving any information regarding the unlawful transactions from another source. Thus, if someone chooses to voluntarily disclose to OFAC, unaware that another source informed OFAC of the transaction, OFAC will not consider the disclosure as a mitigating factor. This begs the questions of why anyone would voluntarily disclose, or incriminate him or herself, when OFAC can allege that they already knew of the transaction, stripping the individual of any benefit of voluntarily disclosing. Additionally, such a standard violates the privilege of self-incrimination and is arbitrary and capricious and can be applied discriminatorily. Again, this is particularly the case where, as here, individuals are not being informed of their right to counsel and the Guild urges OFAC to inform individuals of that right.

31 C.F.R. Part 515 - Cuban Assets Control Regulations

The National Lawyers Guild unwaveringly objects to OFAC's proposed appendix, which reads "Cuba Travel-Related and Certain Other Violations of 31 C.F.R. Part 515." Specifically, the Guild objects to the "Traveler Violations/Amounts for Prepenalty Notices."

While such proposed regulations may provide for more consistency as to the dollar amounts imposed as fines by OFAC, the proposed rule does not address, but rather continues to perpetuate, the issue of discriminatory treatment of certain travelers.

Firstly, OFAC uses the broad term, "tourist travel-related transactions." OFAC fails to distinguish between an organized or individual trip to Cuba to sit on the beach versus and organized or individual trip to Cuba for educational or people-to-people exchange purposes. These are clearly very different kinds of trips to Cuba. That is not to say that both purposes for travel are not an exercise in the freedom of movement- or travel - declared a fundamental right by the Supreme Court. Yet, a trip for educational or people-to-people exchange is also a very clear exercise of First Amendment freedoms of speech and to gather information. But, in the eyes of OFAC, both are equally sanctionable conduct that must be harshly fined - \$7,500 for a first trip and \$10,000 each additional trip.

Secondly, OFAC further acts discriminately by imposing much lower fines on Cuban-Americans who travel to Cuba. That is, "[t]ravel-related transactions involving unlicensed visits to close relatives" are not fined at all for the first trip - only a warning letter is sent - and a \$1,000 fine for a subsequent trip if OFAC is notified or \$4,000 if OFAC is not notified. Thus, Cuban-Americans traveling to Cuba in violation

of OFAC's regulations, are punished less-harshly. The Guild strongly opposes OFAC's use of discrimination in applying harsh civil penalties.

Thirdly, OFAC proposes fines of \$3,000 prior to agency notice and \$10,000 subsequent to agency notice for "[t]ravel-related transactions where no specific license was issued under 31 C.F.R. 515.560(a)(3)-(12) but where there is evidence that the purpose of the travel fits within one of the categories of licensable activities." Many, probably most, Americans do not know that there is a complex law regulating travel to Cuba and never realize that travel to Cuba in the 21st Century is still prohibited. In addition, the Cuban Assets Control Regulations are convoluted and unclear in many areas, making it difficult for lawyers to fully understand, let alone a layperson. Further, as our current administration seeks to impose democracy in other parts of the world, one can't imagine the same administration imposes limits on our freedom to travel. All of this, combined with the fact that travel is permitted to other countries still under socialist or communist rule and/or with ver! y clear track records of human rights violations (the People's Republic of China, Vietnam, North Korea), many people travel to Cuba without a license having never realized that there is a licensing application process and having seen so many advertisements for travel to Cuba through a third country. OFAC's proposed rule to harshly fine such individuals is arbitrary and capricious and violates such individuals' First and Fifth Amendment rights. On these grounds, the Guild opposes such a rule.

Thank you for your attention to this matter.

Sincerely,

Bruce D. Nestor, President
National Lawyers Guild

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